

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-4221

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ATINUAEL COLATO, :

Petitioner, :

v. :

DOCKET NO. 75-4221

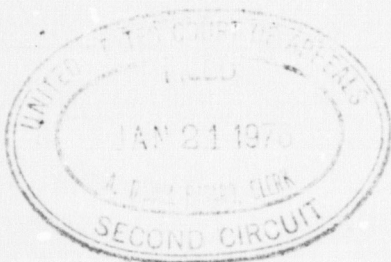
IMMIGRATION AND :
NATURALIZATION SERVICE, :

Respondent. :

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B
P/S

PETITIONER'S BRIEF + APPENDIX



ROSENBERG, ROSENBERG & ROCKMAN
ATTORNEYS AND COUNSELLORS AT LAW
200 GARDEN CITY PLAZA
GARDEN CITY, N. Y. 11530

(516) 248-4300

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STATEMENT OF FACTS

A citizen of El Salvador, ATINUAEL COLATO, married one HERMINIA VELEZ, a United States citizen, at Mineola, New York, on June 9, 1973 (see Certificate of Marriage annexed to the Petition).

That thereafter, a petition was prepared to adjust the status of Mr. Colato to that of permanent resident alien (immediate relative status under the Immigration and Naturalization Act).

That thereafter, a brief hearing was held at which the petitioner's attorney was not present as he did not then represent the petitioner. As a result of said hearing, a decision was rendered on or about March 24, 1975 that the visa petition be denied on the basis of a brief one-half page decision. (Decision annexed to petition).

That while the decision (Paragraph 3) indicates serious discrepancies and contradictions, nowhere in the decision is there a statement as to what the discrepancies were, and for that purpose, the record is totally devoid on any meaningful information.

At a hearing held on or about February 11, 1975 which resulted in the decision of March 24, 1975, there was an undisputed finding that the beneficiary resided for approximately six months together as husband and wife, but has since that time, separated (physically, but not legally).

Based upon that sparse finding, a determination was made that the beneficiary was entitled to no status, and in accordance with the applicable provisions of the Immigration and Naturalization Act, an appeal was taken to the Board of Immigration Appeals which rendered a decision on or about September 15, 1975 dismissing the appeal.

It is interesting to note that the decision of the Board of Immigration Appeals (annexed to Petition) at the top of Page 2, holds "...we conclude that the petitioner has not established that she ever lived with the beneficiary." which is in direct contravention to the factual finding of the District Director which resulted in the decision below.

The instant appeal was taken from the decision of the Board of Immigration Appeals as well as that of the District Director.

ARGUMENT

It will be argued that there being a bona fide marriage in law and fact, as established by the record and documentation, there was no basis to deny the petitioner's petition for an adjustment of the beneficiary's status.

POINT I

PETITIONER, HAVING ESTABLISHED A
VALID BONA FIDE MARRIAGE WITH THE
BENEFICIARY, THE ADMINISTRATION
AGENCY BELOW COULD NOT DENY THE
ADJUSTMENT OF STATUS PETITIONED FOR.

It is not controverted by petitioner and in the decision of the District Director that HERMINIA VELEZ and ATINUAEL COLATO were married in Mineola, New York on June 9, 1973, and that thereafter lived together for approximately six months, although the Board of Immigration Appeals seemingly found differently based on the same record.

The parties are both Spanish speaking, and, as found in the decision of March 24, 1975, did actually live together for the period of six months before the parties became physically separated.

There is not one fact, although there are certainly conclusions, which serve as a basis for the determination of both the Board of Immigration Appeals and the District Director's office which militate in favor of the finding in question.

The marriage license which was submitted to the hearing officer was adequate proof that the marriage was

legal where consummated and there is no contradiction of that fact. There is absolutely no testimony elicited at the hearing which could serve as a basis for overcoming the presumption of validity, even for the purpose of a petition to adjust status under the Immigration and Naturalization Act. To quote from the case of Gee Che On v. Brownell, 253 F. 2nd 814, 5th Cir. Ct. of Appeals 1958, at page 817:

"In order to be legitimate a marriage need not conform to American customs. If it is legal in China, it will be accorded legality here. There was no evidence indicating any irregularity in the marriage, and the marriage having been proved, there was a strong presumption of its validity. See Lim Kwock Soon and Lim Kwock Min v. Brownell, 5 Cir., 253 F.2d 809."

Believing that there is a strong presumption of validity, an inference cannot be drawn from evidence of a physical or legal separation, for that matter, that the marriage was a sham. (See Matter of E, 5 Immigration and Naturalization 305 1953).

The most recent and definitive decision in the area and the one relied upon on the appeal to the Board of Immigration Appeals is Bark v. Immigration and Naturalization Service, 511 F.2d, 1200, 9th Cir.1975. 1 FLR 2273.

Bark is virtually on point in the instant case and serves as a base to reverse a finding virtually identical to the instant case.

The Bark case supra is so substantially on point to the instant case that it would be a disservice to attempt to extract relevant quotes from the case itself. It must be read in toto.

Suffice it to say, the record in the instant case is barren and contains absolutely no information, albeit there are minimal conclusions that the marriage was not bona fide within the purview of the act to allow a change of status.

This has neither been supported by law or fact and to this date, HERMINIA VELEZ and ATINUAEL COLATO are husband and wife.

CONCLUSION

THIS ORDER OF THE BOARD OF IMMIGRATION
APPEALS WHICH AFFIRMED THE ORDER OF THE
DISTRICT DIRECTOR SHOULD BE REVERSED
AND ATINUAEL COLATO GRANTED THE STATUS
OF AN ALIEN RELATIVE FOR ISSUANCE OF AN
IMMIGRANT VISA.

Respectfully Submitted,

ROSENBERG, ROSENBERG & ROCKMAN,
Attorneys for Petitioner
Office & Post Office Address
Two Hundred Garden City Plaza
Garden City, New York 11530
(516) 248-4300

GEORGE ROCKMAN, Of Counsel
- On the Brief -

as we conclude that the petitioner has not demonstrated

APPENDIX

1. Petition For Review.
2. Certificate of Marriage.
3. Decision of District Director dated March 24, 1975.
4. Decision of Board of Immigration Appeals on September 15, 1975.
5. Copy of Bark case supra annexed to the Petition in the Court of Appeals.
6. Original Petition and supporting papers.
7. Such other papers as are submitted by the Immigration and Naturalization Services which are in Respondent's possession.

the Western District of North Carolina, merit in this appeal. The principal point

AFFIDAVIT OF SERVICE BY MAIL


STATE OF NEW YORK)
 : SS.:
COUNTY OF NASSAU)

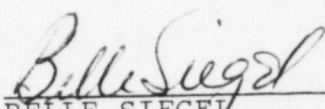
BELLE SIEGEL, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Plainview, New York.

That on the 19th day of January, 1976, deponent served the within PETITIONER'S BRIEF upon the U. S. ATTORNEY'S OFFICE, Southern District of New York at One St. Andrew's Plaza, New York, New York 10007, the address designated by said attorney for respondent for that purpose by depositing ~~two~~ true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within in New York State.

SWORN TO before me this
19th day of January, 1976.


GEORGE ROCKMAN
Notary Public, State of New York
NO 52-3316950
Qualified in Suffolk County
Commission Expires March 30, 1977 1


BELLE SIEGEL

